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No. 02-527

IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE M. ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK STATE THRUWAY AUTHORITY IN SUPPORT OF PETITIONERS

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Interest of *Amicus* New York State Thruway Authority[1]

This case will determine whether Project Labor Agreements ("PLAs") will continue to be viable construction management tools on public construction projects across the nation.

The New York State Thruway Authority ("Authority") is a New York public authority with responsibility for the construction, reconstruction, improvement, maintenance and operation of the Governor Thomas E. Dewey Thruway ("Thruway") system. The Thruway system consists of 641 miles of highway and over 900 bridges, running from the New York-Pennsylvania border in western New York, through the upstate New York cities of Buffalo, Rochester, Syracuse and Albany, and south to the Connecticut border and into New York City. It includes parts of Interstates 87, 90, 84, 190, 95 and 287, and is a vital link in the nation's interstate transportation system. It is the largest continuous toll road in the United States. Given the size of this infrastructure system, the Authority is constantly engaged in major and minor construction, reconstruction, improvement and repair work. The Authority relies on federal funds to assist with a number of its projects. Notwithstanding this financial assistance, the federal government has no ownership or other proprietary interest in the Thruway.

The Authority strives to accomplish these construction tasks as cost effectively and efficiently as possible. Since this Court's decision in *Building and Construction Trades Council v. Associated*

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[1] This Brief is submitted pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States. The New York State Thruway Authority submitted *amicus* briefs on the issues presented in this proceeding to both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia during the proceedings below.

Builders and Contractors of Mass./R.I., 507 U.S. 218 (1993) (*"Boston Harbor"*), the Authority has made case-by-case decisions regarding the appropriateness of using PLAs on its projects as a means of achieving these objectives.

The Authority's own experience has shown that a PLA can greatly enhance its construction efforts. For example, on two major construction projects -- the Tappan Zee Bridge refurbishment project and the I-287/Cross-Westchester Expressway Project ($139 million and $265 million, respectively) -- the Authority successfully utilized PLAs to lower costs and improve construction efficiency. For each of these projects (which received at least some federal assistance), studies completed by outside experts showed that PLAs would enhance timely completion and save millions of dollars. With respect to a number of other projects since 1992, however, the Authority determined that a PLA was not likely to enhance project completion and/or generate significant cost savings and opted to proceed without a PLA.

Significantly, in each instance the Authority has been able to determine whether or not to use a PLA based on its own proprietary interests, and consistent with the holding of *Boston Harbor*, in much the same way as any private project owner makes such a decision. The effect of Executive Order 13202 is to take that proprietary decision-making power away from the Authority. Substituted in its place is a federal regulation -- Executive Order 13202, 66 Fed. Reg. 11225 (Feb. 17, 2001). Section 3 of that Executive Order precludes the Authority, and its construction manager, from requiring a PLA for any project receiving federal assistance, no matter how small a portion of total construction costs that federal assistance represents. The Executive Order effectively denies the Authority the right to use a PLA on many projects because as a matter of state law the Authority must contract directly with its project contractors,

and therefore must include any PLA requirement in its bid specifications.

Summary of Argument

PLAs are an important construction management tool for public project owners. Executive Order 13202 takes that tool away from public entities receiving federal financial assistance. Although purportedly procurement-related, the Executive Order accomplishes this end through regulation. Because this regulation conflicts with federal labor policy it is preempted by the National Labor Relations Act.

Reasons for Granting the Writ

In upholding Executive Order 13202, the decision of the D.C. Circuit Court of Appeals raises serious questions as to whether, despite this Court's *Boston Harbor* decision, PLAs sanctioned by Section 8(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), can be used effectively on public construction projects. *Building and Construction Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). The D.C. Circuit seriously misapplied the federal preemption doctrine as developed by this Court and applied in *Boston Harbor*, and which other Circuit Courts of Appeals have correctly applied since *Boston Harbor*. As a result, public project owners, private construction employers, employees and unions have been denied important federal rights. The issues raised by this case are of critical importance to the management of public construction projects in this country and warrant further guidance from this Court.

I.

THE DECISION BELOW IS ANTITHETICAL TO THE FEDERAL PREEMPTION DOCTRINE

Boston Harbor recognized the right of public owners, acting in a proprietary capacity, to utilize PLAs in the construction and repair of their real property assets to the same degree that these construction management tools are available to private owners. This Court not only concluded that this public use of PLAs does not conflict with federal labor policy, but found that such use "exemplifies" the very workings of the market forces which Congress anticipated in establishing federal labor policy. *Boston Harbor*, 507 U.S. at 233.

The D.C. Circuit's decision permits the federal government to take this right away based on its conclusion that the Executive Order reflects proprietary conduct which is not subject to preemption principles. The Court of Appeals based this conclusion on two faulty premises: first, whenever the federal government acts to ensure the most effective use of its funds, it is acting in a proprietary capacity; and second, the imposition of conditions on the award of federal financial assistance constitutes regulatory conduct only if those conditions do not relate to the project receiving the federal funds.

A. The Role of Project Labor Agreements

To place the present controversy in context it is important to understand how PLAs operate, and how they benefit public project owners, contractors and the public.

Section 8(f) of the NLRA allows a construction industry employer and union to enter into special collective bargaining agreements called prehire agreements, while Section 8(e)

permits these prehire agreements to require that all contractors on a particular project become parties to these agreements. *Boston Harbor*, 507 U.S. at 230-31; 29 U.S.C. § 158(e) and (f). A PLA is a type of prehire agreement, designed to govern all contractors, employees, and unions performing construction work on a specific project. In the absence of a PLA, each contractor on a project would operate under the terms of its own local collective bargaining agreement with each applicable labor organization or, if non-union, under its own particular rules and policies. Oftentimes these agreements and policies are in conflict, which makes it difficult and costly to coordinate construction. A PLA is an umbrella agreement that governs all on-site construction and supersedes conflicting provisions of local agreements and non-union contractor practices, thereby providing uniformity and standardization across the project. On large, complex public projects, this means more timely, efficient and cost effective construction.

PLAs also typically contain comprehensive dispute resolution mechanisms to minimize worksite disputes, no strike clauses that provide the project with blanket protection from all disruptions due to labor disputes for the duration of the project, and cost saving provisions to help contain project costs and assist in on-schedule completion. Because PLAs are available to union and non-union bidders alike, all contractors have equal access to project work. However, PLAs typically require that all successful project bidders become bound to the PLA, that the signatory unions be recognized as the bargaining representative of employees covered by the agreement for that one project, and that covered employees either become union members or pay the equivalent of union dues.[2]

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[2] Most PLAs expressly provide that covered employees have the choice to become full union members or simply pay a dues equivalent without full membership. *See also Communications Workers v. Beck*, 487 U.S. 735 (1988).

1. A Case Study: The Tappan Zee Bridge Project

A 1993 Authority project illustrates the difficult management issues that confront public project construction managers and owners, and how PLAs can solve those issues. In 1993, the Authority undertook the $139 million repair and refurbishment of the Tappan Zee Bridge ("TZ Bridge Project"). This three-mile long bridge crosses the Hudson River, connecting Rockland and Westchester Counties in New York, via Interstate 87. It is a major commuting thoroughfare to New York City (more than 24.5 million vehicles cross the Bridge in an easterly direction alone on an annual basis), and generates toll revenues of nearly $72.2 million annually. The Project was anticipated to take over four years to complete and involve over 1,000,000 man-hours. The Bridge is located in a highly unionized part of the State, and experience indicated that, with or without a PLA, the successful bidders for that work likely would be union contractors already party to local labor agreements. Therefore, it was anticipated that the scope of the TZ Bridge Project would involve 19 different local union jurisdictions and require coordinating work under 19 different local labor contracts.

(a) The Challenges

The number of union jurisdictions involved on the TZ Bridge Project presented the potential for major project management problems. The union agreements contained conflicting provisions regarding (1) start and end times for work shifts, (2) pay practices, (3) break times, (4) holidays, (5) availability of flexible shifts (*e.g.*, four, 10-hour day workweeks), and (6) various other work rules. In addition, any non-union contractor on the Project would have brought its own rules to the site. Coordinating work under these conflicting provisions necessarily would have added time and cost to the Project.

The involvement of so many different trade jurisdictions also increased the potential for costly work stoppages. With 19 different unions, the risk of jurisdictional disputes was high. The Authority also was concerned that lawful disputes between organized labor and non-union contractors could lead to picketing, project disruption, and costly construction delays. In addition, over the projected four-year life of this project, each of these 19 local labor agreements would expire at least once. Consequently, there were going to be at least 19 separate negotiations occurring between local unions and local contractors during the construction period, any one of which could have led to an area strike directly affecting continuation of work on the TZ Bridge Project and use of the Bridge.

Finally, the very nature of the TZ Bridge, the scope of the Project, and its duration made it critical that, regardless of local union agreements or non-union construction practices, the Authority have the ability to stage construction work around peak traffic times and allow the use of innovative reconstruction methods, thereby minimizing commuter disruption and inconvenience.

(b) The Solutions

The Authority turned to a PLA to meet these challenges. As an umbrella agreement, the PLA superceded conflicting provisions found in the otherwise applicable local labor agreements and non-union contractor practices, thus ensuring uniformity on the site. For example, uniform shift provisions in the PLA eliminated the inefficiencies caused by differing work day start and end times and allowed the use of coordinated work schedules for everyone. Similarly, the PLA required everyone to recognize the same holiday schedule, coordinate break times and follow other uniform work rules. And, when the project management needs of the Bridge required extended

work days (*i.e.*, the use of four, 10-hour day workweeks) to allow work during off-peak traffic times, the PLA permitted that schedule change. The TZ Bridge PLA also allowed contractors to utilize extended nighttime shifts for implementation of innovative reconstruction methods unique to that particular project, while minimizing traveler inconvenience.

This ability to manage construction under a uniform set of rules allowed the Project to proceed on the fastest track and in the least disruptive manner possible, which is critical on congested highway and bridge projects where construction must proceed side-by-side with continued use. An enhanced management rights clause in the PLA, along with other scheduling provisions, gave the Authority's construction project manager greater flexibility to coordinate the completion of the various construction phases, reducing the risk of delays and increased costs. When dealing with a revenue-producing asset like a toll bridge, where commuter inconvenience can cause travelers to seek alternative routes, on-time completion of construction is important to revenue maintenance.

The PLA also eliminated the risk of significant delays due to work stoppages. The TZ Bridge PLA contained a comprehensive no strike clause, far more protective of the Project than any provision found in a local labor agreement. This protection extended to all work disruptions, including those originating off site but with the potential to impact Project work. In fact, as a result of this provision, a union which was engaged in a strike against a TZ Bridge contractor off-site, was required to, and did, continue to simultaneously provide workers to that same contractor for all TZ Bridge work, so that the Project suffered no disruption. When the magnitude of the costs resulting from construction delays due to labor disputes inherent on every large construction project is considered, the immense value of this protection is apparent.

This PLA also provided a means of reducing direct labor costs. Under New York prevailing wage law, premium pay for work in excess of eight hours in a day is normally required. The PLA, however, served as a waiver of that requirement and allowed the Project to use a more efficient four-day, 10-hour work schedule with all hours paid at straight time rates. The result was that the construction project manager had added flexibility without an increase in construction costs.

The Authority's consultant for the TZ Bridge Project estimated construction cost savings of more than $3.7 million just from the uniform provisions for work week and shift times, holidays, and apprentices contained in the PLA. Total estimated savings attributed to use of a PLA exceeded $6 million.[3]

B. Purchasing Decisions Can Constitute Regulation

The Court of Appeals observed that because the government is "unquestionably ... the proprietor of its own funds[,] . . . when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." 295 F.3d at 35. If the distinction between proprietary and regulatory conduct were that simple, virtually all governmental purchasing decisions would constitute proprietary conduct and be immune from preemption analysis. Yet, it is well recognized that purchasing

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[3] The Authority's I-287/Cross Westchester Expressway PLA also contained a provision allowing that project to take advantage of a Workers' Compensation alternative dispute resolution ("ADR") program. This alternative is available only through collective bargaining and thus is not an option for non-union employers unless covered by an agreement like a PLA. See N.Y. Workers' Comp. Law § 25(2-c) (McKinney 1993 & Supp. 2002). Cost savings attributable to implementation of a Workers' Compensation ADR Program alone on that project were estimated at $1.28 million. Total cost savings estimated by the Authority's consultant from the use of a PLA on the I-287/Cross Westchester Project were more than $8 million.

decisions can indeed constitute regulatory action. *Chamber of Commerce v. Reich*, 74 F. 3d 1322, 1334 (D.C. Cir. 1996); *see also Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282 (1986).

Given the pervasive role of the federal government in the economy generally, and in particular its role in the financing of state and local public (especially highway) construction,[4] it defies logic to conclude that the imposition of blanket conditions on the receipt of federal financial assistance is not regulatory conduct. The D.C. Circuit itself, in its earlier *Reich* decision, found that a prior Executive Order, 12954, 60 Fed. Reg. 13023 (Mar. 10, 1995), constituted regulatory action despite the fact that it was also premised on the federal government's "proprietary" interest in ensuring the economical and efficient administration of federal government contracts. *Chamber of Commerce v. Reich*, 74 F.3d 1322; *see also Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999) (recognizing that procurement activities can constitute regulation). Thus, the simple fact that Executive Order 13202 purports to be procurement-related cannot shield it from preemption analysis.

C. The Determination That Regulatory Conduct Requires The Imposition Of Conditions Unrelated To The Contract At Hand Is Misplaced

The D.C. Circuit also held that Executive Order 13202 represents proprietary, and not regulatory, conduct because the conditions it imposes are "narrowly" limited to the particular projects receiving federal assistance. Rather than denying funding to recipients who require a PLA in any setting, the

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[4] The Department of Transportation's Federal Highway Trust Fund alone provided more than $22 billion in aid to state and local governments in 1999. Statistical Abstract of the United States (2000 ed.) 307, Chart No. 499.

D.C. Circuit noted that the Executive Order "only" denies federal funding to recipients requiring a PLA on the project for which that funding is intended. Referencing *Boston Harbor*, the D.C. Circuit observed that "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory *only when* ... it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [government].'" 295 F.3d at 36 (emphasis added).[5]

First, *Boston Harbor* does not support the D.C. Circuit's conclusion. *Boston Harbor* holds that government imposed conditions which are unrelated to the performance of the contract commitments at hand are regulatory. However, *Boston Harbor* does not hold that conditions *must* be unrelated to contractual commitments in order to constitute regulation, nor does it sanction all government conditions simply because they bear some relation to those contractual commitments.

Nor should this simplistic dichotomy be adopted. Such a standard would permit the government to impose wide-ranging, blanket conditions, contrary to federal labor policy and disruptive of the deliberate balance Congress sought to

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[5] This formulation, aside from its inappropriateness, represents a circumstance which is not present here. The quoted language refers to a situation in which there is a direct contractual relationship between two parties -- the entity imposing the condition and the entity on which it is imposed -- and the condition relates directly to the latter's performance under that contract. Thus, in *Boston Harbor*, the MWRA imposed a condition on those directly doing business with it, and relating to their performance of the contract between them. Here, the Executive Order imposes a condition on a party the federal government has contracted with (the recipient of federal assistance), but that condition is not aimed at their relationship; rather it is aimed at the relationship between the recipient and a third party (its project contractors), and in some cases the relationship between yet another party (the construction manager) and those same project contractors.

strike, all contrary to basic preemption notions. For example, under this reasoning an Executive Order could deny federal assistance to any public construction project on which union members (or for that matter any non-members of a union) worked. So long as that Order purported to be based at least in part on a Presidential determination that the presence of union members (or the presence of non-members) drove up costs and was not an effective use of federal dollars, it would be a mere purchasing/proprietary decision because it only affected conduct on the assisted project. A similar Presidential determination could justify an Executive Order prohibiting federal assistance recipients from purchasing with those funds goods made by union (or non-union) labor. Or, an Executive Order could debar (or impose other penalties on) contractors found guilty of unfair labor practices on a federally financed project, thereby creating its own, secondary NLRA-enforcement scheme, simply because this action was limited to conduct occurring on that federally financed project.[6] Surely, these conditions, which run directly counter to federal labor policy but affect only conduct relating to a federally owned or assisted project, would not be countenanced.

Second, the Court's decision fails to accord proper weight to the distinction between proprietary and regulatory action found important in *Boston Harbor*. Crucial to this Court's determination was the individualized nature of the MWRA's action:

> The challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project. There is therefore no basis on which

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[6] And if the federal government could accomplish these ends without running afoul of preemption principles, then so too could a state, or even local, government with respect to projects it financed or funded.

> to distinguish the incentives at work here from those that operate elsewhere in the construction industry, . . .

507 U.S. at 232. The D.C. Circuit downplayed this important factor based on its observation that there is no "good explanation" why a blanket rule is inconsistent with the actions of a "proprietor." But it is not coincidental that in cases such as *Wis. Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), this Court struck down "regulation" which was applied in a rigid and undiscriminating manner across-the-board, and which did not reflect individualized, case-by-case decision-making.

It is self-evident that identical governmental and private conduct carries with it different impacts, and those differences are relevant in distinguishing between regulatory and proprietary conduct. "'[G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints....[I]t is far from unusual for federal law to prohibit states from making spending decisions in a way that are permissible for private parties.'" *Boston Harbor*, 507 U.S. at 228 (citation omitted). When the government establishes a broad policy, which affects millions of workers and thousands of businesses, as it has done here, it is acting in a "characteristically ... governmental" manner, and is engaged in regulation. *See also Chamber of Commerce v. Lockyer*, ___ F.Supp.2d ___, 2002 U.S. Dist. LEXIS 19877 (C.D. Ca. Sep. 18, 2002) (recognizing "rigid and undiscriminating" application of a rule as a hallmark of regulation).

Other Circuit Courts, applying preemption principles, have recognized this fact. In *Dillingham Const. N.A. Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), the Court rejected the argument that a challenged state apprenticeship law was not

"regulation" because it only related to the employer's performance of its contractual obligations to the state. The state's efforts to uniformly apply a rule to all public works contracts constituted "regulation" subject to federal NLRA preemption principles. Central to the Ninth Circuit's conclusion was its observation that the state law in issue was not established for a specific project, but rather was of general application.

The Fifth Circuit Court of Appeals' decision in *Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686, even more clearly highlights the conflict between the D.C. Circuit and other Circuit Courts in determining whether government conduct is regulatory or proprietary. Although not arising in an NLRA preemption context, the Fifth Circuit drew from *Boston Harbor* and *Gould* a two-part test:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, ***as measured by comparison with the typical behavior of private parties in similar circumstances***? Second, does the narrow scope of the challenged action ***defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem***? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

180 F.3d at 693 (emphasis added). There can be little doubt that Executive Order 13202 constitutes regulation under this standard. Especially in the context of Section 3 of the Executive Order, wherein the D.C. Circuit viewed the federal government as acting as a lender or benefactor, it is safe to conclude that a

"typical" lender of construction funds does not involve itself in the labor relations of the contractors who are being hired by the borrower/owner with those borrowed funds. And most certainly a "typical" lender would not make an across-the-board determination on such an issue, paying no regard to the particular circumstances of the specific project at hand. Thus, the scope of the Executive Order cannot be considered sufficiently narrow to defeat an inference that its "primary goal was to encourage a general policy rather than address a specific proprietary problem." Where, as here, its prohibitions apply uniformly to every project, regardless of whether the particular PLA available actually benefits a specific project, it smacks of an intent to encourage a general policy and not to address a particular proprietary concern.

D. The Executive Order Conflicts With Federal Labor Policy

The second part of any NLRA preemption analysis is determining whether the regulation at hand conflicts with federal labor policy. Although the D.C. Circuit never reached this issue, clearly Executive Order 13202 is inconsistent with that labor policy and is preempted.

1. Executive Order 13202 Is Invalid Under *Machinists* Preemption Principles

In order to maintain the "intentional balance" Congress struck between labor and management, governmental entities are prohibited from regulating in areas that Congress determined should be controlled by the economic forces of the free market. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976).

As explained in *Boston Harbor*, federal labor policy deliberately provides participants in the construction industry with wide, unregulated latitude to negotiate special collective bargaining agreements aimed at addressing the unique problems of that industry. Under Section 8(f), only the construction industry is exempted from the normal regulation which precludes prehire agreements. 29 U.S.C. § 158(f). Under the Section 8(e) proviso, it is again the construction industry which is excluded from the typical regulations which preclude contracting and subcontracting restrictions of the type found in mandatory PLAs. 29 U.S.C. § 158(e). Congress chose to let the participants in the construction industry deal directly with these issues through the bargaining process. Consequently, the *Machinists* doctrine precludes governmental interference in these areas of federal labor policy which Congress determined should be left free of regulation.

Executive Order 13202 ignores this mandate and seeks to regulate these very activities by prohibiting the use of PLAs. In light of this principle, it is not surprising that the D.C. Circuit foreshadowed the result required in this case when it earlier expressed its own "doubt" regarding the legality of President George Bush's 1992 Executive Order 12818, 57 Fed. Reg. 48713 (Oct. 28, 1992), which also prohibited the use of PLAs on federally funded construction projects. *See Chamber of Commerce v. Reich*, 74 F.3d at 1337; *see also Boston Harbor*, 507 U.S. at 232 ("Indeed, there is some force to petitioners' argument . . . that denying [a PLA] option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*").

An Executive Order that requires all federally financed projects to be built under a mandatory PLA would be similarly preempted. Even if the government's argument that Executive

Order 13202 merely requires "neutrality" (because it only prohibits "mandatory" PLAs) is accepted, the result is the same. The fatal flaw in Executive Order 13202 is not the substance of its position on the PLA issue -- whether it be described as pro, con, or even "neutral" -- but rather that, through government regulation, it has taken a position at all and that it seeks to impose that policy decision on others.

2. Executive Order 13202 Is Invalid Under *Garmon* Preemption Principles

As established by the Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), *Garmon* preemption is "designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation,' . . . embodied in §§ 7 and 8 of the NLRA." *Boston Harbor*, 507 U.S. at 225 (citations omitted). Simply put, *Garmon* precludes interference with conduct the NLRA permits, including interference by Executive Order. *Chamber of Commerce v. Reich*, 74 F.3d at 1334.

Of most concern to the Authority is the fact that the Executive Order interferes with its right, when it acts in a proprietary capacity, to use PLAs on the same terms private sector project developers are permitted to use them. *Boston Harbor* recognized that: (1) PLAs in the private sector are both consistent with federal labor policy and unquestionably permissible; and (2) given the purposes served by PLAs, and the objectives of the NLRA, there is no basis for distinguishing between a private developer and a public owner acting in a proprietary capacity using PLAs. *Boston Harbor*, 507 U.S. at 231. *Boston Harbor* recognized a public owner's right both to use a PLA and to impose the PLA on all successful bidders seeking project work.

Executive Order 13202 denies public owners like the Authority the opportunity to exercise that right.[7]

In the end, mandatory PLAs of the exact kind deemed permissible by the *Boston Harbor* Court are prohibited by the Executive Order on any state or local government project receiving federal financial assistance. And, under the D.C. Circuit Court's decision, could be prohibited by any state or local government providing funding to a project. *Boston Harbor* was greatly influenced by then Chief Judge Breyer's dissenting opinion issued when that case was before the First Circuit. Central to Chief Judge Breyer's concerns was the recognition that preemption in the labor context is designed to ensure a uniform approach to federal labor policy, and avoid an "odd crazy-quilt" of inconsistent practices. *Associated Builders v. Mass. Water Resources Auth.*, 935 F.2d 345, 364 (1st Cir. 1991) (Breyer, C.J., dissenting), *rev'd*, 507 U.S. 218 (1993). Thus, he concluded, to permit private contractors to require PLAs on their projects and prohibit public owners from doing the same would create an unjustifiable inconsistency based on the public and private nature of the project's owners. The D.C. Circuit's decision has exactly that effect. Whether PLAs can be used on a project will "reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts [receives any

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[7] The Executive Order also directly interferes with the NLRA rights of private employers in the construction industry who perform services for public project owners. In those states where, unlike New York, construction managers on public projects contract directly with project contractors, the Executive Order still precludes those construction managers from requiring a PLA. Yet, in those circumstances, the private sector construction managers are "employers in the construction industry," and are fully entitled to all the rights and benefits of the NLRA, including the right to negotiate, enter into, and operate (including the right to require others to operate) under a PLA. *See Boston Harbor*, 507 U.S. at 230.

federal funding]." *See* 935 F.2d at 364. Such a result is inconsistent with federal labor policy.

E. The Significance Of The Issues Presented

According to the U.S. Department of Commerce, in 1999 there was more than $53 billion in new highway and street construction in the United States, and the U.S. Department of Transportation's Highway Trust Fund alone provided more than $22 billion in assistance to state and local governments for such purposes. Statistical Abstract of the United States 711 and 307, Charts No. 1191 and 499. Total federal financial assistance to public construction extends beyond just highway construction. Under any standard, the impact of federal assistance on public construction is significant.

Equally significant is the potential role for PLAs in that public construction, to which the litany of recent cases which have upheld the use of PLAs on public projects bears witness. *See, e.g., Associated Builders & Contractors, Inc. v. San Francisco Airport Comm'n*, 21 Cal. 4th 352, 981 P.2d 499 (Cal. 1999); *Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth.*, 115 Nev. 151, 979 P.2d 224 (Nev. 1999); *A. Pickett Constr., Inc. v. Luzerne Cty. Convention Ctr. Auth.*, 738 A.2d 20 (Pa. 1999); *New York State Chapter, Inc. v. New York State Thruway Auth.*, 88 N.Y.2d 56, 666 N.E. 2d 185 (N.Y. 1996).

Importantly, however, in each of these cases, and the many more just like them, the public project owner was able to make an individualized assessment of whether the particular PLA available for use on that specific project would in fact benefit that project. Under Executive Order 13202, that individualized decision-making authority is taken from any project owner receiving federal assistance. The result is that for billions and billions of dollars of public construction each year, the ability

to proceed in the most efficient and cost effective manner available simply will not exist.

The concern raised by the D.C. Circuit's decision is not that this particular Executive Order prohibits PLAs, for the next Executive Order could require the use of PLAs on all federally assisted projects. Rather, it is that, in either case, the real proprietors of these public projects are denied the recognized right under federal law to decide what is in their best interests, and are forced to succumb to the executive policy of the day.

Conclusion

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

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